

JUL 31 1976

MICHAEL D. ROSS

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. **76 - 36**

YAMAHA INTERNATIONAL CORPORATION,
Petitioner,

v.

HAROLD G. WHITEIS,
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

Respectfully submitted:

COHEN & PLUESS

by: Murray Cohen

504 Investors Capital Building
Oklahoma City, Oklahoma
(405) 232-3591

Attorney for Respondent

TABLE OF CONTENTS

	Page
Statement of the Case	1
Argument	4
Petitioner's Citations	10
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Blenke Brothers Co., Inc. vs. Ford Motor Co., 203 F. Supp. 670, 672	10
Globe Motors, Inc. vs. Studebaker-Packard Corp., 328 F.2d 645 (3d Cir. 1964)	10
Kotula vs. Ford Motor Co., 338 F.2d 732 (8th Cir. 1974)	10
Milos vs. Ford Motor Co., 317 F.2d 712 (3d Cir.), cert. denied, 374 U.S. 896 (1963)	10
Pierce Ford Sales, Inc. vs. Ford Motor Co., 299 F.2d 425 (2d Cir.), cert. denied, 371 U.S. 829 (1962) ...	10
West Coast Hotel Company vs. Parrish, 300 U.S. 379 (1936)	10
Woodward vs. General Motors Corp., 298 F.2d 121 (5th Cir.), cert. denied, 369 U.S. 887 (1962)	10

Statutes:

Oklahoma Motor Vehicle Act, 47 Okla. Stat. Ann., Section 561 et seq	1, 6, 7, 9, 10
15 U.S.C., Section 1221 et seq	7, 10
28 U.S.C., Section 1441 et seq	1, 6, 7, 9

Other Authorities:

Rules of the Supreme Court of the United States	
Rule 19, Considerations Governing Review on Certiorari, (1)(a)(b)	4-5, 11

November 13, 1974. Petitioner appealed. The judgment was affirmed by the Tenth Circuit Court of Appeals on March 23, 1976 (United States Court of Appeals Tenth Circuit, No. 75-1036, Harold G. Whiteis, a sole proprietor, d/b/a Motor Sports of Tulsa, *Plaintiff-Appellee*, v. Yamaha International Corporation, a corporation, *Defendant-Appellant*. No. 75-1037, Harold G. Whiteis, a sole proprietor, d/b/a Motor Sports of Tulsa, *Cross-Appellant*, v. Yamaha International Corporation, a corporation, *Cross-Appellee*. Appeal from the United States District Court for the Northern District of Oklahoma [March 9, 1976], before Hill, Seth and Doyle, *United States Circuit Judges*).

The trial court, the Honorable Howard Bratton, United States District Judge, made findings of fact and conclusions of law (United States District Court for Northern District of Oklahoma, No. 72-C-260, Harold G. Whiteis, a sole proprietor, d/b/a Motor Sports of Tulsa, *Plaintiff*, v. Yamaha International Corporation, a corporation, *Defendant*). He found that the petitioner, Yamaha, through its authorized agents made an oral agreement in the early 1960's, giving respondent, Whiteis, a dealer franchise for the County of Tulsa. The trial court found as a matter of fact that the Statute of Frauds did not abrogate that contract under Oklahoma law. The trial court found that Whiteis did not believe that the written franchises in any way affected or effected the original agreement, the executed oral agreement. The Court found that the franchises were signed by Whiteis because they were represented to be for other purposes. The Court further found that the petitioner, Yamaha, acted in bad faith in that the national sales manager directed the regional sales

manager to get rid of Whiteis and to prepare or fabricate reasons which could be used to get rid of Whiteis whether or not they were genuine reasons. The Court found that the reasons for cancelling or failing to renew Whiteis' franchise were not the true and correct reasons but they were done for impure motives. The Court went on to find that were it not for the directions of a superior, the national sales manager, that Whiteis would not have been cancelled. The Court found, Yamaha extremely negligent and derelict in its conduct. Going on, the trial court found, that under obligations of fair dealing owed to the parties under their contract and under the Statutes of Oklahoma, which the parties agree were applicable to the dealings between them, the company did not act in good faith.

It is interesting to note that in petitioner's Statement Of The Case, on page 3 of its petition, it makes absolutely no mention of the executed oral agreement, the findings of the trial court, but speaks of written franchise agreements which the trial court found to be wanting mutuality, consideration, and of no enforceable value. Had petitioner read the transcript of the trial it would have discovered that two of respondents places of business were temporarily closed; one was closed because a highway was being constructed which did not allow ingress or egress to the premises, and a second store was closed because the landlord was tearing down the existing facilities. Whiteis had arranged to relocate the stores in different locations but was prevented by petitioner from doing so under threat of cancellation. Had petitioner read the trial transcript it would have also learned that Yamaha delivered advertising support to a competitor but not to Whiteis. Petitioner, Yamaha, herein speaks of coercion and intimidation. Had

petitioner read the trial transcript it would find it is replete with intimidation and coercion. Realizing that one firm of attorneys represented petitioner, Yamaha, for the trial before the United States District Court for the Northern District of Oklahoma, and another firm of attorneys represented petitioner, Yamaha, for the purposes of its appeal to the Tenth Circuit Court of Appeals, and a third firm of attorneys are representing petitioner, Yamaha, for the purposes of its petition for writ of certiorari, it might be understandable how the entire record and the findings of the trial court were not fully comprehended.

On page 11 of Yamaha's petition beginning with the last sentence on the page, Yamaha states that "under the approach taken by the Tenth Circuit, a contract provision requiring the dealer to operate only from an authorized location is apparently void, and the franchising manufacturer or distributor is denied the right to determine the respectability and suitability of the surroundings in which its products are to be sold." This is patently not true. One has only to read the decision of the Tenth Circuit Court. This can be found on page 1a, Appendix A, of Yamaha's petition for a writ of certiorari. Respondent, for purposes of brevity, does not include it in its brief in opposition to certiorari.

ARGUMENT

Harold G. Whiteis, (Respondent), prays that the writ of certiorari petitioned for by Yamaha International Corporation, (Yamaha), be denied as being inconsistent with and failing Rule 19 of the Supreme Court of the United States.

Rule 19, considerations governing review on certiorari:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a Court of Appeals has rendered a decision of another Court of Appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Yamaha's petition for a writ of certiorari fails to present any criteria whatsoever pursuant to Rule 19. Petitioner argues two reasons for granting the writ. The first reason is found on page 6 of Yamaha's petition.

"The Decision of the Tenth Circuit conflicts with other Court of Appeals decisions which hold that 'Good Faith' must be viewed in the context of coercion or intimidation or threats thereof."

The original cause of action filed by respondent, Whiteis, was filed in the State District Court of Tulsa County, State of Oklahoma, on June 29, 1972. The trial

court petition basically established two causes of action. First, a cause of action for breach by Yamaha of an executed oral agreement as between the parties establishing a Tulsa County exclusive motor vehicle franchise. The second cause of action was the violation by the petitioner, Yamaha, of the Oklahoma Motor Vehicle Act, 47 Okla. Stat. Ann., Section 561 et seq. No federal question, federal statute, nor constitutional provision is involved. Yamaha, moved to have the State Court action removed to the United States District Court for the Northern District of Oklahoma pursuant to 28 U.S.C., Section 1441 et seq., as an action cognizable in the Federal courts on the basis of diversity. The matter was tried to the court without a jury, and judgment was entered for Whiteis on November 13, 1974. No federal question, constitutional question or question of overriding territorial and/or national significance was involved. The case was in Federal Court upon application of the petitioner, Yamaha, pursuant to diversity only. On appeal, the judgment was affirmed by the Tenth Circuit Court of Appeals on March 23, 1976.

We therefore have a case involving Oklahoma contract and Oklahoma statutory law. Oklahoma law, when tried by a Federal District Court, because of diversity, must follow Oklahoma substantive law.

The first reason petitioner advances for granting the writ must therefore fail on its face. There is no way for the Tenth Circuit Court decision to conflict with other Court of Appeals decisions when it is patently impossible for other Courts of Appeals, other than the Tenth Circuit Court of Appeals, to construe Oklahoma contract and Oklahoma statutory provisions. Respondent can perceive of no way that an Oklahoma law can be removed pursuant to diversity

to any other circuit but the Tenth Circuit. The Tenth Circuit Court of Appeals is the only circuit whereby pursuant to diversity, Oklahoma law can be tried within the Federal system. It follows there can be no conflicts or inconsistencies of decisions with other Courts of Appeals decisions.

Petitioner, Yamaha, herein attempts to apply sophistry and false logic to its first proposition. Yamaha argues that although respondent sued under the Oklahoma Motor Vehicle Statute, 47 Okla. Stat. Ann., Section 561 et seq., that the Oklahoma Motor Vehicle Section "resembles" a Federal Statute, 15 U.S.C., Section 1221 et seq., and that the Federal Statute has been construed in other circuits. The original suit filed in the State Court of Oklahoma did not allege a violation of the Federal Statute, but only the Oklahoma Statute, 47 Okla. Stat. Ann., Section 561 et seq. The trial court, tried the case construing the Oklahoma Motor Vehicle Statute and not the Federal Statute. That being the case, and this is admitted by the petitioner on page 6 of its petition for writ of certiorari under Argument 1 wherein petitioner states:

"...The definition of 'good faith' in the Oklahoma Statute was taken almost verbatim from the definition of that term contained in the Federal Statute,..."

It makes no significant difference from where the Oklahoma Legislature, if in fact it did, took its Oklahoma Statute. It is under the Oklahoma Statute that the respondent's cause of action arose, and under that statute the matter was tried.

Petitioners first basis for granting the writ fails on its face. There is no way an Oklahoma Statute, removed to Federal jurisdiction by virtue of Section 1441 diversity, can

go to any circuit other than the Tenth Circuit. Therefore, it cannot conflict with any other circuit's decision. There is no other circuit but the Tenth Circuit construing Oklahoma statutory law.

To make matters worse, petitioner argues that "good faith" must be viewed in the context of coercion, intimidation or threats thereof. This Honorable Court is invited to simply read the trial court's findings of fact and conclusions of law contained in Appendix B of Yamaha's petition for writ of certiorari on page 13a. For the purpose of brevity, the trial court's decision by the Honorable Howard Bratton, Judge of the United States District Court, is not attached herein.

The second and final reason petitioner argues for certiorari, found on page 10 of its petition for said writ, is as follows:

"The Tenth Circuit, by effectively holding that a franchisor has no right to control the location from which a dealer operates his business, has placed itself in conflict with other circuit court decisions and with the intent of the legislation and has unconstitutionally impaired Yamaha's right to contract."

The final argument in support of its writ of certiorari is not supported by the record. The Honorable Supreme Court of the United States is respectfully invited to read the decision of the United States Court of Appeals for the Tenth Circuit rendered on March 9, 1976, before the Honorable Circuit Judges Hill, Seth and Doyle. The opinion of the Tenth Circuit Court does not hold that a franchisor has no right to control the location from which a dealer operates his business. The decision of the Honorable Tenth Circuit Court is not in conflict with other Circuit Court decisions, with the intent of the legislation and has in

no way unconstitutionally impaired Yamaha's right to contract. The opinion of the Court of Appeals for the Tenth Circuit is found in Yamaha's petition for a writ of certiorari on page 1a, Appendix A, and for purposes of brevity is not contained in the respondents brief in opposition herein.

Yamaha, in its statement of the case beginning on page 3 of its petition either has conveniently mis-stated fundamental aspects of the original litigation or has frankly not read the record. No where in the petitioner's statement of the case is there any mention of the fact that in the original state court action, removed by the petitioner pursuant to Section 1441, diversity, do they mention the written franchise agreements were found, as a finding of fact, by the trial court to have no or little effect on the outcome of the litigation. The trial court found, that there was an executed oral franchise agreement in existence as between the parties, that under Oklahoma law this oral agreement did not violate the Statute of Frauds and that the parties had operated under this executed oral agreement for a substantial period of time before any written documents existed. Further, the trial court held as a finding of fact that the written documents were represented to the respondent to be for other purposes, those purposes being to satisfy the requirements of the Oklahoma Motor Vehicle Commission. The trial court went on further to find in effect that there was no mutuality as concerns the written documents. In addition, the trial court found that the petitioners, Yamaha, exercised negligence, lack of good faith within the meaning of the Oklahoma Motor Vehicle Act, Title 47 Okla. Stat. Ann., Section 561 et seq., and acted in a manner which violated Oklahoma statutory law. Further, that they were in breach of the executed oral franchise agreement.

PETITIONER'S CITATIONS

Yamaha, cites seven cases in support of its two propositions. A reading of those cases indicate that not one of the cases cited by the petitioner resembles the facts in the instant matter.

Six of the seven cases concern the Federal Automobile Dealers' Day in Court Act, 15 U.S.C., Section 1221 et seq. They are *Blenke Brothers Co., Inc. vs. Ford Motor Co.*, 203 F. Supp. 670, 672; *Globe Motors, Inc. vs. Studabaker-Packard Corp.*, 328 F.2d 645 (3rd Cir. 1964); *Kotula vs. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1974); *Milos vs. Ford Motor Co.*, 317 F.2d 712 (3rd Circuit), cert. denied, 374 U.S. 896 (1963); *Pierce Ford Sales, Inc. vs. Ford Motor Co.*, 299 F.2d 425 (2nd Circuit), cert. denied, 371 U.S. 829 (1962); and *Woodward vs. General Motors Corp.*, 298 F.2d 121 (5th Circuit), cert. denied, 369 U.S. 887 (1962). That Act was not sued upon and has no bearing on the case in being. The last case cited by the petitioner, *West Coast Hotel Company vs. Parish*, 300 U.S. 379 (1936), concerns a matter having no bearing on the instant case, but deals with the fact that a right to contract is not absolute but must yield to the exercise of police power.

Whiteis, respondent herein, did not sue under the Federal Statute, 15 U.S.C., Section 1221 et seq., but sued under the Oklahoma Statutes, Title 47 Okla. Stat. Ann., Section 561 et seq. The other cause as previously denominated was the breach of an executed oral agreement entered into in Oklahoma. Although respondent may agree with the law in the cases cited by Yamaha, they have no bearing whatsoever on the case at bar.

CONCLUSION

Respondent, Whiteis, sued in the State Court of Oklahoma and asserted two causes of action. First, a violation of Oklahoma Statutes and the second a breach of an executed oral agreement. Rule 19 of the Supreme Court of the United States as set out heretofore, notwithstanding the discretion that the Supreme Court has, sets out the guide lines for granting certiorari. Those guide lines are not met by either of the two propositions advanced by the petitioner or the authorities cited in support thereof.

For the reasons herein, respondent, Whiteis, respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted:

COHEN & PLUESS

by: Murray Cohen

504 Investors Capital Building
Oklahoma City, Oklahoma
(405) 232-3591

Attorney for Respondent